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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

PAUL SCHMIDT, JANE W. SCHMIDT and LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation, individually and as use beneficiee of E. L. Harlin,

Petitioners,

vs.

ARCHER IRON WORKS, INC., a corporation,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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AS TO STATEMENT OF FACTS.

Part of the Petitioners' contention in this Court for Certiorari is illustrated by the Respondent's statements in the portion of its Brief entitled Statement of Facts.

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While Respondent observes that even the trial judge held (as his written opinion in the Appendix to the Petitioners' Petition indicates) that there was a sufficient evidentiary basis for the jury's verdict in favor of the plaintiff so as to warrant the trial judge's denial of the respondent's motion for new trial, nevertheless the Respondent implies that the evidentiary basis supporting the verdicts of the jury should be ignored in favor of the respondent's "controlling facts" which would have supported an opposite verdict in favor of the respondent.

Seizing upon that portion of the conflict in evidence favoring the Respondent, and which was submitted to the jury and rejected by them, the Respondent then argues that the evidence favorable to it is uncontradicted, vehemently repeating that it is uncontradicted. It should be noted, however, that the pin that broke and which defendant said it never manufactured was painted the same color paint as the rest of the concrete pouring tower which defendant admittedly did manufacture. The pin broke at a factory painted factory weld according to positive testimony and the defendant admitted to welding its pins at the factory in the same place as the break in the instant pin. There was also positive evidence that there was no field welding or field painting done on the job and no parts were made on the job or added to the structure. This and much other evidence refuted the possibility that the factory painted factory welded pin in an Archer tower came from elsewhere than Archer.

It is not only not true, as the respondent repeats, that its evidence is uncontradicted, but all of the petitioners' evidence "contradicts" the respondent's evidence and formed the very issue of fact which the jury resolved in favor of the petitioners and which the trial judge held

was supported by sufficient evidence to warrant denying Respondent a new trial.

It is this very issue of fact, and its resolution in favor of the petitioners by the jury, as confirmed by denial of new trial and as upheld by the intermediate Appellate Court as being supported by the manifest weight of the evidence, that the Petitioners assert are the vital essence of the constitutional trial by jury which this Court should protect.

What good is the right to trial by jury in a constitutional, or any other sense, if an issue of fact is resolved in favor of the plaintiff by a jury and the trial judge holds there is enough evidence to deny granting a new trial and the Intermediate Appellate Court finds the verdicts are supported by the manifest weight of evidence but the Supreme Court, by a retroactive change in the rules, reweighs the weight of evidence and disagrees with the jury and the Appellate Court and the conditional ruling of the trial judge as to weight of evidence.

If all these judges can re-weigh the evidence, what is left of the jury's function?

Nor is it true that this issue was not raised in apt time.

The Intermediate Appellate Court decided in favor of the Petitioners. On Respondent's Petition for Leave to Appeal to the Supreme Court of Illinois your Petitioners were aware of the principles that findings of fact by the Intermediate Appellate Court were final and binding on the Supreme Court, which had often said that it would not re-weigh, indeed, did not have jurisdiction to re-weigh, the facts. Cases holding these principles have been cited to this Court in the initial Petition for Certiorari.

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An Answer to a Petition for Leave to Appeal is not required, and being a remedy that is seldom granted, the Petitioners filed no answer to the Petition for Leave to Appeal. There was nothing in the rules of review, even according to Robertson & Kirkham to foreshadow the ruling complained of. Indeed, for the Petitioners to have presumed, contrary to these established principles, would only have resulted in urging the Supreme Court of Illinois, contrary to Petitioners' best interest, to grant leave to appeal.

The granting of leave to appeal by the Supreme Court of Illinois was merely a decision to review the case and not a ruling adverse to the petitioners. It did in no way indicate or suggest that the conventional rules would not apply and that the Intermediate Appellate Court's findings of fact in favor of the Petitioners would not be binding in the Supreme Court. Such a result first became known in the opinion of the Supreme Court of Illinois when it decided the case adversely to the Petitioners. The Petitioners then promptly raised the Supreme Court's deprivation of the constitutional trial by jury in the Petition for Rehearing, a copy of which has been filed of record in this Court.

AS TO RESPONDENT'S REASONS FOR DENYING CERTIORARI.

In its argument under point I, the respondent characterizes the question asserted by the Petitioners as formal, devoid of merit and foreclosed by past decisions of the Court because judgment notwithstanding the verdict is a remedy as old as the Constitution and not inimical to it. From these truisms the Respondent states that reviewing courts may constitutionally set aside a verdict and enter judgment in favor of a party against whom the evidence is insufficient in law.

Without specifying what criteria may properly be used to determine when evidence is insufficient in law, the respondent implies that it does not matter what criterion is employed, the jury function cannot be affected, impaired or destroyed by it.

Of course, this Court knows better than most that any criterion which can never affect the principle it subserves is no criterion at all. None of the cases cited indicate that this Court ever endorsed such a position.

In the celebrated case of *Lavender* v. *Kurn,* this Court has said that the touchstone of judicial review is whether there is an evidentiary basis for the verdict, and other cases cited by the Petitioners indicate directing a verdict or granting judgment notwithstanding the verdict does vitally involve the very essence of the constitutional right to trial by jury. Indeed, it can destroy it.

This Court has said in the *Galloway* case, and other cases, that due allowances must be made for all reason-

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able possible inferences favoring the party whose case is attacked and has granted certiorari where the State Supreme Court doubted that the evidence warranted a particular finding. *Brinkerhof* v. *Hill*, 281 U.S. 673 (1930).

In the instant case the issue is not simply the proper criterion for determining judgment notwithstanding the verdict, but also the substantial change in that rule from the date the cause of action accrued to the date of the second review of the case and the retroactive application of that changed rule, imposing a greater burden of proof on petitioners than they would have had otherwise. This too has been the basis of certiorari by this Court. *Armstrong* v. *Manzo*, 380 U.S. 545.

This Court has been solicitous of other constitutional rights, such as freedom of speech, press, religion, civil rights, and the rights of accused criminals.

The Petitioners believe this Court is no less concerned about the ordinary litigant's right to trial by jury.

If overwhelming weight of evidence is the proper criterion for judgment notwithstanding the verdict, should that not have been the law at the time the cause of action accrued? Does a litigant have a right to know the ground rules in effect when his cause of action accrues? If judicial fiat can "change" the applicable rule between accrual of action and review, why cannot judicial fiat abrogate the rule entirely under the guise of rule changes? If the jury is not "the" fact-finding body, then should not that new principle be expressly stated so all may know?

As this Court has re-examined its age-old concepts in civil and criminal rights, and found some of them to be wanting, it would seem that a re-examination of the right to trial by jury in civil cases is needful and in terms of increasing volume, pressing.

The ordinary litigant's rights to a jury trial are not undeserving of this Court's attention. At one time it salved the former judicial conscience to say that the federal constitution is not a vehicle by which alleged erroneous decisions of a State Court may be tested. The decisions of this Court in the past decade prove otherwise and show that this Court does not close its eyes to injustice or take refuge in legal technicalities.

Years ago it sufficed to follow legal precedent strictly and narrowly, however old. But today the spirit is concern and a high regard for individual rights.

The Respondent uses more space in its brief arguing technicalities of the law than it does in arguing that it is not and should not be liable to the plaintiff as the jury found and the Appellate Court said was supported by manifest weight of evidence.

The fact that so many people disagree as to the result is itself evidence of the presence of an issue of fact. In this context, where a jury and three Appellate Court Judges agree as to the result, it is submitted that no further review within the confines of human legal abilities can accomplish little more than a substitution of one set of opinions for that of the jury, and hence a substantial destruction of the jury system. Where, as here, the further review is accomplished by a court that should not re-weigh the evidence and does so under a changed rule that did not exist when the occurrence took place, the constitutional right to trial by jury is an empty one, though expensively so.

What happens to the Petitioner who is no longer able to provide for his family may be solely his own affair, but what happens to the jury system as it is subjected to

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rule changes that let one get to the jury on a legal presumption but others cannot get to the jury on positive conflicts in evidence, is a matter of concern for all.

It is respectfully submitted that what is being done with the right to trial by jury deserves this Court's attention and warrants the issuing of a writ of certiorari to the Supreme Court of Illinois in the instant case.

Respectfully submitted,

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